Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.
2015 NY Slip Op 30082(U)
January 22, 2015
Supreme Court, New York County
Docket Number: 652229/2010
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

---------- X

HUDSON-SPRING PARTNERSHIP, L.P.,

Plaintiff,

-against- Index No. 652229/2010

P+M DESIGN CONSULTANTS, INC., and
Poulin + Morris, Inc,

Defendants.

---------- X

Joan A. Madden, J.:

Plaintiff Hudson-Spring Partnership, L.P. ("Hudson") moves for summary judgment on its amended complaint, and for "costs and expense" on the ground that defendants' response to its notice to admit was inadequate. Defendants oppose the motion and cross move for summary judgment dismissing the amended complaint and for summary judgment as liability on their counterclaim alleging breach of the lease and constructive eviction.

Background

In this action, Hudson seeks to recover money for outstanding rents allegedly due and owing under a lease agreement ("Lease") and two extension agreements for commercial space located at 286 Spring Street, New York, NY ("the Building"). The Lease was for a seven year term beginning December 31, 1991, and was between Hudson, as landlord, and Richard Poulin Design Group, Inc., as tenant. By assignment, extension, and modification of lease agreement, dated December 31, 1998, between Hudson, as landlord, Richard Poulin Design Group, Inc., and its assignor, P+M Design Consultants, Inc. ("P+M"), as tenants, the lease term was extended for an additional seven year term, ending on December 31, 2005. Upon the expiration of the first extension agreement, Hudson and P+M entered into second extension agreement dated

December 29, 2005, (hereinafter the "Agreement"), which is at issue in this action.

Poulin + Morris, Inc. ("Poulin + Morris") is a corporation incorporated by the same principals as P+M. Hudson maintains that although Poulin + Morris was not a party to the underlying lease or the extension agreements, it was the actual occupant of the leased premises during the term of the Agreement and that P+M was simply a "shell" company formed for the sole purpose of paying rent to Hudson. By decision and order dated March 15, 2013, the court granted plaintiff's motion to amend to assert a claim of piercing the corporate veil, including that Poulin + Morris exercised complete dominion and control over P+M, which existed only as a shell corporation.

Under the Agreement, P+M had the right to terminate the Lease on or after December 31, 2010, with a minimum of 180 days written notice to Hudson. Any termination prior to December 31, 2010, required P+M to provide plaintiff with a minimum of 12 months written notice. On October 27, 2010, defendants' principal Douglas Morris ("Morris") sent an e-mail on behalf of Poulin+Morris to Hudson, stating that "we would like to end our lease" Poulin + Morris subsequently vacated the premises on or around November 1, 2010, in violation of the provide twelve months notice requirement. P+M did not make any more rent payments to Hudson after it moved out. However, Hudson retained the $20,000 security deposit.

The amended complaint asserts causes of action for: breach of contract, use and occupancy, unjust enrichment and piercing the corporate veil. Each cause of action seeks $250,000, plus attorneys' fees. Defendants answered the amended complaint and asserted various defenses and a counterclaim for breach of the lease/constructive eviction.

Hudson's Motion and Defendants' Cross motion for Summary Judgment

Hudson now moves for summary judgment on the complaint, and in support of its motion submits, *inter alia*, the affidavit of its principal, Harry Chernoff ("Chernoff"), copies of the Lease and extension agreements, and the deposition testimony of Morris, defendants' principal. Chernoff states that in late 2010, Morris contacted him and told him that defendants would be vacating the premises. He states that while from time to time maintenance issues would arise at the Building that during the period between January and November 2010, defendants did not make any written complaints against the Building. Chernoff point out that emails sent by Morris, which he attaches, do not mention any issues with the Building's maintenance. Chernoff also states that the record shows that defendants decided to re-locate well in advance of their move and points to receipt for the purchase new stationary dated January 2009, and various emails related to work to be done on the new office space dating more than six months before the move. Chernoff also relies on Morris' deposition testimony that he had decided to move out of the Building more than ten years earlier.

In support of its position that P+M is a shell corporation and the corporate veil must be pierced so that Poulin + Morris can be held liable for outstanding rent payments, Hudson relies on Morris' deposition testimony that P+M did not have any clients, did not generate any revenue, and that the money in P+M's only bank account at Chase was funded by Poulin + Morris, that this money was used to pay rent and taxes, and that the premises was used and occupied by Poulin+Morris and not P+M.

Defendants oppose the motion and cross move for summary judgment dismissing the amended complaint and for summary judgment as to liability with respect to the counterclaim. In

support of defendants' position that their vacating the premises constituted a constructive eviction, defendants submit Morris's affidavit in which he states that over time, the condition of the Building deteriorated and that "when we vacated in November 2010, the [Building] was half empty with more tenants poised to leave. These other tenants left for the same reasons we did–the [Building] was unhealthy and no effort was made to maintain it as it once was maintained." Morris Affidavit ¶2(b). Morris attaches an email sent to him from Chernoff dated October 20, 2010, in which Chernoff states that "[t]he reasons you gave me for wanting/needing to move were strong," and asserts this statement constitutes an admission by Chernoff as to the poor conditions of the Building

Defendants also submit photographs of the conditions of the Building which show, *inter alia*, dead roaches, rusted pipes, peeling paint and twisted electrical wires. In his affidavit and during his deposition, Morris described "dire conditions" in the Building "which adversely affected clients, employees and staff," including rats and cockroaches running in the hallways, numerous dead vermin stuck in glue traps, limited water pressure in the bathrooms which prevented toilets from flushing, a steady vibration noise coming from the roof, a leaky roof, an elevator that constantly broke down, and heat that would go off sometimes for days at a time. Morris also maintains that he complained numerous times about the Building's conditions and although he testified at his deposition that complaints were made and but the Building did not remedy the conditions or if the problem would be fixed temporarily only to occur again.

Defendants also note that Hudson produced only one vendor contract during discovery to show that the Premises was "well maintained" and during his deposition Chernoff could not name one outside vendor used for the Building for basic services such as extermination,

plumbing or elevators. Defendants also argue that since Chernoff planned to convert the Building into condominiums he had no incentive to honor the terms of the Lease, and point to evidence that the Building is being converted to such use.

With respect Hudson's position that the corporate veil should be pierced so as to hold Poulin + Morris liable, defendants argue that Chernoff's deposition testimony demonstrates that he was not defrauded or misled to believe that P + M, as opposed to Poulin + Morris, would occupy the space. Specifically, they note that Chernoff testified that he never asked Mr. Poulin or Morris about the differences between P+M and Poulin + Morris, and that he did not notice that P+M signed Lease and other agreements even though Poulin+Morris was listed in the building directory in the lobby. He explained that he did not draw a distinction between the two entities since he was dealing with two individuals, Richard Poulin and Morris, although he conceded that these individuals refused to give him a personal guaranty.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

With respect to the breach of contract claim, the elements of such a claim are (I) formation of a contract between plaintiff and defendant, (ii) performance by plaintiff, (iii)

defendant's failure to perform, (iv) resulting damages. Harris v. Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept 2010); Clearmont Prop., LLC v. Eisner, 58 AD3d 1052, 1055 (1st Dept 2009). Here, Hudson has provided evidence showing that it entered into a contract with P+M, that is Lease and the two extensions agreements, that Hudson performed its obligations under the agreements, that P+M was in breach by vacating the premises without giving the agreed-to notice and by failing to pay rent for the remainder of the extended lease term. However, defendants have raised a triable issue of fact as to whether, as alleged in their counterclaim, Hudson breached the Agreement and/or relieve of the obligation to pay rent for the remaining term of the Agreement due to constructive eviction.

"[A] constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises. " Barash v. Pennsylvia Term. Real Estate Corp., 26 NY2d 77, 83 (1970)(internal citations and quotations omitted). For there to be a claim of unjust enrichment the tenant must abandon the premises. Id.. "Whether a constructive eviction has occurred is generally a question of fact for the trier of fact." West Broadway Glass Co. v. I.T.M. Bar, 171 Misc2d 321, 322 (App. Term 1st Dept 1996), modified on other grounds, 245 AD2d 232 (1st Dept 1997).

Here, defendants have submitted sufficient evidence to raise triable issues of fact as to whether the conditions in the Building were such that they were substantially and materially deprived of the beneficial enjoyment of premises, including that the Building was infested with

vermin,[1] lacked adequate water pressure and heat, the roof leaked, and the elevators consistently did not work. See H.K.D. Seafood v. 25 N. Moore Assoc., 271 AD2d 351 (1st Dept 2000)(tenants constructively evicted where they were deprived of refrigerated space at the premises); Johnson v Cabrera, 246 AD2d 578 (2d Dept 1998)(lower court properly found that commercial tenant was relieved of its obligation to pay rent where it had been constructively evicted when frozen pipe condition left premises without heat and water for two months); Barnard Realty Co. v. Bonwit, 155 AD 182 (1st Dept 1913)(constructive eviction exists where an apartment because uninhabitable due to smell of dead rodents within the walls).

Moreover, while defendants did not immediately abandon the premises after the conditions arose, it cannot be said that the delay in vacating the premises was unreasonable as a matter of law and/or not attributable to the condition of the Building, particularly in light of evidence that defendants complained about the conditions and Hudson indicated that it would remedy them. Incredible Christmas Store-New York, Inc. v. RCPI Trust, 307 AD2d 816, 817 (1st Dept 2003)(delay in vacating premises was not unreasonable as a matter of law); Jones P. Day Realty Corp. v. Franciscan Sisters for the Poor Health System, Inc., 256 AD2d 134 (1st Dept 1998)(question as whether defendant failed to abandon the premises with reasonable promptness raises an issue of fact).See Pasqua v. DeMarchi, 31 AD2d 781 (4th Dept 1969)(that tenant previously considered moving is not fatal to defense of constructive eviction).

Furthermore, even if defendants are unable to establish a constructive eviction, they may be able to establish a breach of the lease which would give rise to damages potentially calculated

---

[1]While the Lease requires the tenant to provide extermination services, given the extent of the problem, and tenant's occupation of the sixth floor only, it cannot be said as a matter of law that Hudson was not responsible for alleviating the condition.

by the difference between the value of the leased premises and the value resulting from breach. See West Broadway Glass Co. V. I.T.M. Bar, Inc., 245 AD2d at 232; City of New York v. Pike Realty Corp., 247 NY 245, 249 (1928).

On the other hand, Hudson has demonstrated sufficient facts to warrant piercing the corporate veil so as to hold Poulin + Morris liable under the Agreement entered into by P+M. To pierce the corporate veil it must be shown that (1) the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue; and (2) such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury. TNS Holdings., Inc. v MKI Securities Corp., 92 NY2d 335, 339-40 (1998); Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141-42 (1993). However, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d at 339, *citing* Morris v New York State Dept. of Taxation and Fin., 82 NY2d at 141-42.

Here, the record shows that P+M did not have any assets, liabilities, and did not transact any business aside from entering into the lease agreements with Hudson, and that the premises was occupied by Poulin + Morris and not P+M. Moreover, while, in general," [the] fact-laden claim to pierce the corporate veil is particularly unsuited for resolution on summary judgment" (Forum Ins. Co. v. Texarkoma Transp.Co., 229 AD2d 341, 342 (1st Dept 1996)) when, as here, the record shows that a shell corporation is formed solely for the purpose of paying rent to evade any liability under a lease, the courts have consistently found that the corporate veil should be pierced as a matter of law. See e.g., Ventresca Realty Corp. v. Houlihan, 41 AD3d 707 (2d Dept

2007)(trial court erred in denying summary judgment to landlord on claim to pierce the corporate veil where "evidence showed corporation signing the lease was a mere 'dummy' or 'shell' entity created solely for the purpose of signing the lease");CC Ming (USA) Ltd. Partnership v. Champagne Video, Inc., 232 AD2d 202 (1st Dept 1996)(granting summary judgment permitting the corporate veil to be pierced where tenant, inter alia, held no assets other than lease at issue and kept no corporate records); Fern, Inc. v. Adjmi, 197 AD2d 444, 444 (1st Dept 1993)(holding that plaintiff landlord had established its claim for piercing the corporate veil as a matter of law so as to impose the corporate rent obligations on defendant which "exercised complete dominion and control over that corporate entity that signed lease, which, as a mere alter ego of that defendant, had no assets, liabilities or income... and which had never transacted any business other than entering into the subject lease agreement").

In addition, contrary to defendants' position, evidence that Chernoff did not make a distinction between the two corporations and defendants did not conceal that the premises was used by Poulin+Morris as opposed P+M, is insufficient to raise an issue of fact in the absence of evidence that Hudson knowingly bargained for this arrangement. See e.g., CC Ming (USA) Ltd. Partnership v. Champagne Video, Inc., 232 AD2d at 202 (rejecting defendants' argument that the corporate veil should not be pierced as the landlord's predecessor "knowingly accepted a tenant that had no real existence and would not, in fact, occupy the leased premises" in the absence of "independent evidentiary support that such an unusual arrangement was bargained for"). Accordingly, Hudson is entitled to pierce the corporate veil and to hold Poulin+Morris liable for any payments found to be due and owing under the Agreement.

With respect to the use and occupancy claim, since the undisputed record shows that

P+M paid rent throughout the period that it was in possession of the premises, and that Poulin+Morris did not occupy the premises for any time after the expiration of the lease term, the claim for use and occupancy must be dismissed. See Towne Partners LLC v RJZM, 79 AD3d 489 (1st Dept 2010)(use and occupancy is only owed for the period of time that tenant possessed apartment after expiration of lease). While the First Department held that based on the allegations in the amended complaint that Hudson had sufficiently plead that Poulin+Morris could be potentially liable for use and occupancy (see Hudson-Spring Partnership, L.P. v. P+M Design Consultants, Inc., 112 AD2d 419, 419-420 (1st Dept 2013)), such determination is not dispositive on this summary judgment motion.

The unjust enrichment claim must also be dismissed as a matter of law. To prevail on a claim of unjust enrichment, a plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered . Cruz v McAneney, 31 AD3d 54, 59 (2d Dept 2006). "[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what was recovered." Mandarin, 65 AD3d 448, 453 (1st Dept 2009), aff'd, 16 NY3d 173 (2011), quoting Paramount Film Distrib. Corp. v. State of New York, 30 NY2d 415, 421, rearg denied 31 NY2d 709 (1972), cert denied 414 US 829 (1973). Central to a claim for unjust enrichment is an allegation that a "'benefit was bestowed...by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiff'" Weiner v. Lazard Freres & Co., 241 AD2d 114, 119 (1st Dept 1998), quoting, Tarrytown House Condominiums v. Hainje, 161 AD2d 310, 313 (1st Dept 1990). Here, as the undisputed records shows that the rent was fully paid throughout the period

that Poulin+Morris used the premises, and no other benefit was conferred on defendants, the unjust enrichment claim must be dismissed.[2]

Finally, contrary to Hudson's argument, it is not entitled to "costs and fees" under CPLR 3123(c) based on defendants' alleged failure to adequately respond to Hudson's notice to admit, particularly as the omitted information was provided by Morris during his deposition.

Conclusion

In view of the above, it is

ORDERED that Hudson's motion for summary judgment is granted only to the extent of granting it summary judgment on its fourth cause of action to pierce the corporate veil and is otherwise denied; and it is further

ORDERED that defendants' cross motion is granted to the extent of dismissing the second and third causes of action, for respectively, use and occupancy and unjust enrichment; and it is further

ORDERED that the remainder of the action shall continue.

DATED: January 22, 2015

HON. JOAN A. MADDEN
J.S.C.

[2]While, as Hudson points out, the First Department affirmed the court's finding granting plaintiff leave to amend to include a claim of unjust enrichment (see Hudson-Spring Partnership, L.P. v. P+M Design Consultants, Inc., 112 AD2d at 420), such determination is not dispositive on this motion for summary judgment.